
ENVIRONMENTAL LAW AND PROPERTY RIGHTS

LEGAL ALCHEMY: THE GENERAL MINING LAW OF 1872 AS PRIVATIZATION MODEL

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Sometime soon you will pick up a major newspaper and read that an environmental pressure group is denouncing the Bush Administration for a massive “giveaway” of public resources to a foreign mining company under the “outmoded” General Mining Law of 1872.¹ Such attacks on the “outdated,” “tawdry,” “anachronistic,” “gargantuan fire breathing dragon” of the Mining Law have become routine. Former Clinton Interior Secretary Bruce Babbitt brought this critique into the government, staging a dramatic signing of a “check” for \$10 billion when, as required by law, he signed over title to land claimed by a Canadian mining company under the Mining Law.

It is true, as the critics claim, that under the Mining Law anyone who discovers valuable mineral resources on much (but not all) of the federally owned public land can obtain not just the mineral rights but also a complete title to both the surface and mineral rights. It is also true that obtaining this title requires giving the government only a nominal payment. The law does not “giveaway” public resources, however. Instead, it transforms rock into gold (and other valuable minerals) – serving as a sort of legal philosopher’s stone. The Mining Law does so because it provides an institutional solution to the problems caused by public ownership of valuable resources. Because of the strengths of the Mining Law, the United States has avoided many of the problems experienced by other mineral-rich countries under a variety of alternative approaches. Far from an outdated relic of the 19th century, as critics contend, the General Mining Law of 1872 represents a model for allocating publicly owned resources.

How the Law Works

In much of the world governments claim ownership of mineral resources under all land, including privately held property. In the United States, mineral resources under private property are usually also owned privately. Mineral rights under public land are usually owned by the same government that owns the surface but those under most federal public lands are available to be claimed under the Mining Law.

The Mining Law’s basic operation is quite simple (although some specific features give rise to extraordinarily complex legal questions). The fundamental principle is that any one may claim eligible mineral resources located on eligible public land by (a) discovering the existence of valuable resources; (b) complying with minimal requirements to record and prove the claim; and (c) paying a small fee. Once these steps are accomplished, at the claimant’s option, the claimant receives title to either the mineral resources alone or both the mineral resources and the surface estate.

This might not be as significant if either the lands or the minerals eligible to be claimed were defined narrowly. They are not. Minerals are eligible to be claimed if they have

not been specifically removed by other federal statutes (e.g. oil, natural gas, and “common” minerals such as gravel). Mobile resources such as oil and natural gas require coordinated approaches to their recovery from common pools and the law deals with them differently. “Common” minerals like gravel are so common that including them would allow claims of virtually all federal land. (That might be a good thing, but it isn’t the aim of the Mining Law.) Federal lands are eligible to be claimed if the lands were neither “acquired” nor withdrawn by the federal government. Acquired lands are those the federal government has purchased from the lands’ owners (for a post office or national park, for example). Withdrawn lands are unpurchased lands dedicated to specific uses (such as parks or military bases). These exceptions to the general principle of allowing free access to publicly owned mineral resources are quite sensible. Withdrawn lands are largely those being used for other purposes and allowing someone to claim them would disrupt the existing use. Acquired lands were acquired for a purpose and allowing them to be claimed would prevent the government from having secure title to land needed for government buildings, parks, and the like.

A Brief History of U.S. Mining Law

American mining law is radically different from mining law in most of the rest of the world. How did this difference arise? There were several, relatively small mineral rushes before 1849, but American mining law is the direct result of the experience of the California Gold Rush. Gold was discovered at Sutter’s Mill only a few days before the official transfer of California (and much of the rest of Mexico’s northern territory) to the United States. Under Mexican law, based on the European continental legal tradition, mineral deposits were the property of the state. As a result, it was at least possible that those rights would now belong to the United States, since the U.S. had promised only to respect existing Mexican titles in the transferred territory.

The discovery of gold dramatically changed California, however, and made an assertion of title to the mineral resources by the U.S. federal government impossible. Three things left the mineral resources of the new American territory in a legal limbo. First, the Gold Rush brought tens of thousands of people in just a few years into what had been a sparsely populated hinterland. These new residents were not interested in legal theories of ownership; they wanted to get rich quickly. Second, the rapid collapse of Mexican forces in California meant the new territory was taken with only a small American military force. The American commander in California refused to take responsibility for civil law enforcement and, with the threat of desertion growing as word of the riches awaiting in the hills spread, could do little with the troops he had. Third, Congress was paralyzed over the status of the new territories and the question of whether to

allow slavery in them. As a result, Congress did nothing for over a year to resolve the new territory's legal status.

The immigrants to California did not wait for the politicians in Washington, D.C. to settle the question of mineral rights ownership and slavery. They simply moved to California and took possession of mineral resources. The miners developed a customary legal system adequate to safeguard their claims built around recognition of first possession, creation of a title register, and restrictions on tort-based crime.² California's budding political class did not wait either – they organized a provisional state government and successfully sought admission to the union as a state in 1850. This gave mining interests positions in the Congress to head off any attempts by the federal government to assert ownership of mineral resources. By the time the federal government was first able to address mining issues in the 1860s, there was little choice but to recognize the customary practices of the miners. Congress did just that in the 1866 Lode Law,³ the 1870 Placer Act,⁴ and the General Mining Law of 1872.

Since 1872, the Mining Law has been attacked regularly by those looking to increase the federal revenue by substituting royalty schemes for the free access principle. In particular, eastern interests have repeatedly attempted to realize the potential revenue in selling mineral rights to transfer that revenue to their own pockets. The Mining Law's survival is due largely to the geographically concentrated nature of the mining industry in the western states with large amounts of federal land. As a result, western state senators, regardless of party, have used Senate procedural rules to repeatedly block attempts to require payment of royalties, use of auctions, and other methods designed to produce revenue for the federal government from hard rock mineral resources under public land.

Is it a good thing that the Mining Law has not been abolished? Environmental pressure groups and eastern state senators and congressmen don't think so. Particularly during the Clinton Administration, the Mining Law was under attack almost continuously by both outsiders and the Administration itself. Secretary of the Interior Bruce Babbitt led the charge, by staging public relations events like his signing of the "check" for \$10 billion and by using administrative means to obstruct the Mining Law.⁵ He also appointed John Leshy, one of the Mining Law's most determined and articulate critics, to be the Solicitor General of the Interior Department, where Leshy worked hard to undermine the law.⁶ Critics are especially outraged that some of those who claim land under the Mining Law then don't actually mine. Instead, some have opted to build ski resorts or houses. The critics seem to have a good argument: why give away valuable resources instead of selling them? The argument is less sound than it first appears, however. Giving away mineral resources is precisely the right way to ensure that appropriate choices are made about the use of these resources. Moreover, the Mining Law provides a template for how to allocate other publicly owned resources as well.

Why Give Minerals Away?

Giving away mineral resources under the Mining Law solves three important problems that plague governments of countries with mineral resources around the world: it creates incentives to locate minerals, to develop resources when it is economically sensible to do so, and avoids corruption. The alternatives (auctions, royalty schemes, licensing) are inferior to the Mining Law with respect to each of these.

The most basic problem with respect to hard rock mineral resources is finding deposits to develop. Mining is long past the days of the California Gold Rush, when miners literally picked gold nuggets up out of streams or hunched over streams with a pan. Most mining operations today operate on low grade ore that requires processing tons to recover usable amounts of the mineral. Finding the deposits takes a considerable investment in developing knowledge about the characteristics of each area explored. It is not uncommon, for example, for mining companies to spend up to a million dollars locating and evaluating a potential claim. The title to the mineral resources is thus not free for the mining company – it is paid for by investment in knowledge that enables the mineral resource to be exploited.

Consider the alternative of auctioning mineral rights. If the federal government does not determine the mineral content of the subsurface before the auction, the price of the mineral rights to each parcel will reflect only the average value of such rights. Some lucky auction participants will purchase the rights to plots that ultimately have mineral resources and receive a windfall over the price they paid. The rest of the participants will have worthless mineral rights. If, on the other hand, the federal government first spends the money necessary to conduct a mineral survey of all its lands, auction participants will bid more for valuable plots. The cost of securing those higher bids is the cost of conducting surveys on all the federal land and the foregone revenue from the sites about which the surveys generated information that there is *not* a substantial mineral deposit, which will surely exceed the additional revenue. By rewarding investment in knowledge, the Mining Law gives individuals an incentive to discover valuable information – where mineral deposits exist under eligible public land – at no cost to the government.

By rewarding those who discover information about the value of public lands, the Mining Law "sells" the land for the price of production of useful information rather than for the price of a transfer payment to the government. As a result, those interested in acquiring mineral resources invest in the production of useful knowledge – the location of valuable mineral deposits. Society gains knowledge; those who produce the knowledge gain the right to exploit the minerals. The trade is similar to that offered to those who discover other forms of new, useful knowledge – we award patents to inventors for the same reason that we grant mineral rights (a right which we also describe with the legal term "patent") to those who discover them.

Once mineral rights have been privatized under the Mining Law, the new owner has no obligation to actually

develop the resource. Like the owner of any other form of private property, mineral rights owners who acquired their mineral rights under the Mining Law may sell their property, make use of it, or do nothing with it. In a number of high profile cases, the property owners have opted to do something other than mine the land and exercise mineral rights they acquire under the Mining Law. For example, near the Keystone, Colorado ski resort, the General Accounting Office found a 160 acre claim patented in 1983 for \$2.50 per acre (the statutory fee) and never mined was now worth \$11,000 an acre.⁷

Criticism of such outcomes misses an essential point. Private ownership of land is an effective means of ensuring appropriate choices are made about land use because land owners bear the costs and reap the rewards of their choices. In the Keystone mining claim example, the best use of land near a luxury ski resort is unlikely to be mining, unless the mineral deposits are extraordinarily valuable. Armed with the knowledge of the value of the mineral deposits underlying the 160 acre parcel, the landowner made a tradeoff between recreational and mining uses and chose the more valuable use. What the critics of the Mining Law really object to is not the failure to mine but the privatization of the land use decision. (The criticism is also a bit disingenuous as it seems unlikely that those criticizing the landowner's decision would really be happier if he had opted to dig an open pit mine on the site.)

The alternative to private land use decisions is continued federal management of the land in question (since all land privatized under the Mining Law is federal land). The record of federal land management agencies is hardly encouraging. Even with respect to "crown jewel" public lands such as Yellowstone National Park, the federal government has performed appallingly badly in managing the land.⁸ With respect to less well known lands, the federal record is as bad or worse. The reason is simple: federal land managers and their political bosses in Congress bear neither the costs nor reap the rewards of the land management decisions they make.

The Mining Law's simple rules and virtually automatic privatization of land claimed has an important additional benefit: avoiding corruption. In virtually every nation with significant natural resources, where those resources are allocated through a process that provides government officials with discretion in choosing who will receive permission to exploit the resources, corruption is rampant. Indeed, the problem is so pervasive that natural resource economics includes a serious debate on whether or not the presence of significant resources constitutes a "curse" rather than a blessing for a nation.⁹ The nondiscretionary nature of the Mining Law provides an effective guarantee against corruption; there is simply nothing to allocate, and so no reason to bribe an official.

There is some evidence that 19th century legislators deliberately chose to give away resources to avoid official corruption. Long before the California Gold Rush, Congress had tried using leases, sales, and other revenue generating

methods to dispose of public lands. Giving resources away was the innovation, not their sale, and the federal government gave away a great deal of the public domain during the 19th century through the homestead laws, transfers to states, and a variety of other laws including the General Mining Law. The subsequent experience with discretionary disposal programs further supports the anti-corruption rationale. From the Teapot Dome scandal of the 1920s, which arose out of the oil leasing program, to the coal lease programs of the 1980s, to the recent scandals involving the Bureau of Indian Affairs, corruption issues have plagued such programs.

What About the Environment?

Many critics of the mining industry argue that the potential for environmental problems requires restricting mining, including replacing the Mining Law with licenses that could incorporate environmental safeguards and more stringent government oversight of mines. In particular, the critics point to the possibility that long after a mine has closed, environmental problems will appear. Since the mine owner will have been long gone, they argue, the public will be left with the cost of cleaning up the former mine site.

There is some appeal to this argument. Mines do pose hazards after their closing. Water collects in the mine shafts and pits, absorbs chemicals, and then finds its way out of the mine site into rivers and aquifers. In some cases this process takes decades and the responsible party is impossible to find when the pollution is discovered.

In reality, however, mining is no different than many other human activities. Pharmaceutical companies manufacture medicines that may have long term adverse consequences, which become known long after the manufacturer is no longer in business. Manufacturers create products which may have latent defects, discovered only after the responsible parties are long gone from the scene. Farmers store a variety of hazardous materials on their properties, from fuel to pesticides, which may leak into soil and groundwater and not be discovered until a new owner changes the land use decades later. In short, we all engage in behavior with potential long term consequences which will remain unknown indefinitely, yet we do not regulate much of this behavior. Should mining be different?

Our answer is no. Critics of mining and the Mining Law neglect two important points. First, mining is subject to the general rules of tort, contract, and property law as well as to the overall environmental laws (e.g. the Clean Water Act). These legal rules already ban harm to the lives and property of others. To justify additional regulatory measures, there must be evidence of harms which these laws do not address. Second, property ownership creates an incentive for the owner of the land (and recall that the Mining Law allows claimants to receive both the surface estate and the mineral rights) to take into account the total value of the combined surface and mineral rights. If mining operations reduces the value of the surface estate, it takes money straight from the pocket of the land owner. Just as other property owners do, mine owners will therefore consider the impact of their opera-

tions on the long term value of the property. Creating latent hazards will reduce the value of the surface estate, since potential buyers will be hesitant to accept property that has not had sufficient remediation.

Will these points be sufficient to prevent every former mine site from causing environmental harm in the future? We don't know. But would, for example, requiring a \$100 million bond for 30 years offer such protection? That's also uncertain – what if the bonding company goes bankrupt? What if the damages turn out to be \$200 million? Because we cannot know the future, we cannot buy ourselves absolute security from potential future harms.

Conclusion

The principle of free access to mineral resources on public lands, as embodied in the General Mining Law of 1872, has survived for over 130 years despite regular assaults from rent-seekers and interest groups. It has survived because it solves three key problems in the transformation of rock into gold. First, it creates appropriate incentives to motivate individuals to undertake the very expensive and risky business of finding valuable mineral deposits at no cost to the public. Second, once those individuals have found the minerals, it gives them the incentive to make appropriate decisions about whether or not to extract the minerals, weighing the alternative land uses against mining. Finally, by eliminating government discretion, it dramatically reduces the potential for government corruption.

This alchemy can be done elsewhere as well. The potential for great wealth exists throughout our society, with undiscovered “gold” just waiting for entrepreneurs to uncover it. Electromagnetic spectrum frequencies, for example, are capable of multiple uses. Allocating such goods through auctions bleeds the winners of the capital they need to develop the resource; allocating them to those who identify a means of exploiting the resource would focus that capital on productive activities. Deciding among competing uses of valuable resources, whether it is land outside a ski resort or radio frequencies, is a task to which government is ill-suited, as bureaucrats neither receive the rewards of good choices nor bear the costs of bad ones. Privatizing resources puts them in the hands of those who win or lose depending on their choices, creating powerful incentives to make those choices well. Corruption is an endemic problem in government as the endless, and expensive to administer, ethics laws, campaign finance reforms, and other efforts to stem it attest. Removing discretion from government activities, and making more of government's responsibilities turn on self-initiated action by citizens, is an effective means of eliminating corruption before it appears. Like Harry Potter, who unexpectedly finds the philosopher's stone in his pocket at the end of the second book, we have the institution needed to turn all sorts of things to gold at our fingertips. We need only use it.

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Footnotes

¹ 30 U.S.C. §22 et seq. This article is derived from Andrew P. Morriss, Roger E. Meiners, and Andrew Dorchak, *Homesteading Rock: A Defense of the Free Access Principle under the General Mining Law of 1872*, 34 ENVIRONMENTAL LAW 745-807 (2004) (Any reader who would like a copy of this article may contact Morriss at andrew.morriss@case.edu and a copy will be sent.). More extensive citations to support our arguments, as well as more extended versions of many of them, are contained therein. For another, excellent market-based defense of the Mining Law, see Richard Gordon & Peter VanDoren, *Two Cheers for the 1872 Mining Law*, Cato Policy Analysis No. 300 (1998) at *4, available at <http://www.cato.org/pubs/pas/pa-300.html>

² See Andrew P. Morriss, *Miners, Vigilantes, & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 LAND & WATER L. REV. 581 (1998); John Umbeck, *A Theory of Contract Choice and the California Gold Rush*, 20 J.L. & ECON. 421 (1977); and JOHN UMBECK, *A THEORY OF PROPERTY RIGHTS, WITH APPLICATION TO THE CALIFORNIA GOLD RUSH* (1981).

³ Lode Law of 1855, 14 Stat. 251 (repealed 1872).

⁴ 16 Stat. 217 (1870).

⁵ See Andrew P. Morriss, Roger E. Meiners, and Andrew Dorchak, *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMINISTRATIVE LAW REVIEW 551 (2003).

⁶ Leshy authored the most comprehensive critique of the Mining Law before coming to Interior. See John D. Leshy, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 14 (1987).

⁷ General Accounting Office, *The Mining Law of 1872 Needs Revision*, at 4 (March 1989) GAO/RCED-89-72.

⁸ See Louis De Alessi, *Private Property Rights as the Basis for Free Market Environmentalism*, in *WHO OWNS THE ENVIRONMENT?* (Peter J. Hill & Roger E. Meiners, eds., 1998) at 29 (“Environmental problems typically arise when property rights are not fully private and/or transaction costs are substantial. Under these circumstances, individuals do not bear the full economic consequences of their decisions and thus lack the incentive to take them fully into account.”)

⁹ See, e.g., Xavier Sala-I-Martin and Arvind Sumramanian, *Addressing the Natural Resource Curse: An Illustration from Nigeria*, NBER Working Paper 9804 (2003) at 5 (finding that “stunted institutional development – a catch-all for a range of related pathologies, including corruption, weak governance, rent-seeking, plunder, etc. – is a problem intrinsic to countries that own natural resources such as oil and minerals.”)